

STATE OF MICHIGAN
COURT OF APPEALS

ROBERTA HOPKINS, Personal Representative of
the Estate of OLIVE HERFORD, Deceased,

UNPUBLISHED
April 20, 2006

Plaintiff-Appellant,

v

JAMES E. GRAHAM, JR., M.D., JAMES E.
GRAHAM, JR., M.D., P.C., FARAH TAHER,
M.D., PHAN ANH NGUYEN, and HURLEY
MEDICAL CENTER,

No. 261867
Genesee Circuit Court
LC No. 04-079449-NH

Defendants-Appellees.

Before: Fort Hood, P.J., and White and O'Connell, JJ.

PER CURIAM.

In this wrongful death medical malpractice action, plaintiff Roberta Hopkins, personal representative of the estate of the decedent, Olive Herford, appeals as of right from a circuit court order granting summary disposition to defendants Dr. James E. Graham, Jr., and his medical corporation, James E. Graham, Jr., M.D., P.C., Hurley Medical Center, and Drs. Farah Taher and Phan Anh Nguyen. The circuit court determined that plaintiff's complaint was time-barred and granted summary disposition pursuant to MCR 2.116(C)(7). We reverse and remand for further proceedings.

I

According to plaintiff, on December 4, 2001, at Hurley Medical Center (Hurley), the defendant doctors performed several surgical procedures on Olive Herford, including a total abdominal hysterectomy. During the period of Herford's postoperative hospitalization, which extended through December 7, 2001, she complained of nausea, had blood in her urine, gave limited urinary output, and could not have a bowel movement. Nonetheless, she was discharged from the Hurley on December 7, 2001.

Herford's limited urination and inability to vacate her bowels continued through the next several days, and she started exhibiting abdominal distension. On December 10, 2001, she was readmitted to Hurley on the basis of her distended abdomen, severe edema, and abdominal pain, nausea, and vomiting. Dr. Graham treated Herford on December 10, 2001, and on December 14, 2001, took a cystogram of Herford's bladder, which indicated that her bladder had ruptured. On

December 15, 2001, large collections of fluid were drained percutaneously from Herford's pelvis, but her condition still failed to improve.

On December 18, 2001, Herford underwent further procedures, during which doctors repaired a leak in her bladder and a tear of her ileum. The procedures did not arrest the deterioration of Herford's condition, and she died on December 25, 2001.

After receiving letters of authority appointing her as personal representative of Herford's estate on January 23, 2002, plaintiff gave defendants notice of her intent to pursue medical malpractice claims on January 21, 2004, and filed this medical malpractice action on July 21, 2004. Defendants moved for summary disposition pursuant to MCR 2.116(C)(7) on the basis that plaintiff had untimely filed the action outside the two-year medical malpractice period of limitation, MCL 600.5805(5), and relying on *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004), beyond the wrongful death saving period provided in MCL 600.5852.

Plaintiff responded seeking to distinguish the instant case from *Waltz* on the basis that while *Waltz* held that the tolling provision of MCL 600.5856(d) does not operate to toll the five-year outside limit for filing a wrongful death medical malpractice action contemplated in MCL 600.5805(5) and MCL 600.5852, MCL 600.5856(d) does toll the initial, two-year wrongful death saving period. Plaintiff also maintained that *Waltz* should not apply retroactively to this case. Alternatively, plaintiff urged the circuit court to deem the complaint timely by judicially tolling the period of limitation, especially in light of the confusion that existed when plaintiff commenced the action concerning the appropriate filing period, and that retroactive application of *Waltz* would violate due process principles by shortening the period of limitation applicable to this action. The circuit court granted summary disposition, and plaintiff reasserts her arguments on appeal.

II

Whether a period of limitation applies in particular circumstances, and whether the doctrine of equitable or judicial tolling should apply given the facts of this case, constitute legal questions that this Court considers de novo. *Bryant v Oakpointe Villa Nursing Centre, Inc*, 471 Mich 411, 419; 684 NW2d 864 (2004); *Detroit v 19675 Hasse*, 258 Mich App 438, 444-445; 671 NW2d 150 (2003).

We first observe that a panel of this Court has rejected the distinction plaintiff seeks to draw between the instant case and *Waltz* based on the distinction between the two-year and three-year provisions of the savings statute. In *Farley v Advanced Cardiovascular Health Specialists, PC*, 266 Mich App 566; 703 NW2d 115 (2005), the Court stated:

Farley argues that neither *Waltz* nor *Ousley* [*v McLaren*, 264 Mich App 486; 691 NW2d 817 (2004)] addressed whether a suit is timely when, as here, the personal representative filed suit within three years after the two-year medical malpractice limitations period (MCL 600.5805) had expired, and therefore those cases do not determine the outcome here. It is true that, in *Waltz* and *Ousley*, the personal representative filed suit after both the two-year malpractice limitations period (MCL 600.5805) and the three-year ceiling set forth in the wrongful death saving provision (MCL 600.5852) had passed. However, this factual distinction

makes no difference. As noted, the three-year ceiling in the wrongful death saving provision is not an independent period in which to file suit; it is only a limitation on the two-year saving provision itself. [*Farley*, 266 Mich App at 574-575. Footnote omitted.]¹

Thus, plaintiff's effort to distinguish *Waltz* on this basis must fail, and if *Waltz* is to be applied retroactively, plaintiff's claim is barred.²

III

Plaintiff asserts that *Waltz*, decided on April 14, 2004, should not be applied to bar the instant case, in which the relevant procedural events occurred before the issuance of the *Waltz* decision. In *Ousley*, *supra* at 486, this Court rejected the plaintiff's argument that *Waltz* should be applied only prospectively. However, in *Mullins v St Joseph Mercy Hospital*, 269 Mich App 586; ___ NW2d ___ (2006), a panel of this court declared a conflict with *Ousley* pursuant to MCR 7.215(J), and this Court subsequently convened a special panel to resolve the conflict. The outcome of that case will determine this issue.³

IV

Plaintiff also argues that if defendants' [and *Farley's*] interpretation of *Waltz* is correct, equity and due process demand the application of judicial tolling because plaintiff was required to file the notice of intent under MCL 600.2912, and, further, she relied on *Omelenchuk v Warren*, 461 Mich 567; 609 NW2d 117 (2000), clarified and overruled in part in *Waltz*, *supra* at 652-655, in filing her claim when she did. In *Mazumder v Univ of Michigan Regents*, ___ Mich App ___; ___ NW2d ___ (2006)⁴, a panel of this Court agreed that separate and apart from the pure

¹ The *Farley* Court also stated:

We note that the three-year ceiling in this provision does not establish an independent period during which a personal representative may bring suit. Specifically, it does not authorize a personal representative to file suit at any time within three years after the period of limitations has run. Rather, the three-year ceiling limits the two-year saving period to those cases brought within three years of when the malpractice limitations period expired. As a result, while the three-year ceiling can *shorten* the two-year window during which a personal representative may file suit, it cannot *lengthen* it. [*Farley*, *supra* at 573 n 16 (emphasis in original).]

² To the extent that plaintiff argues that *Waltz* itself was incorrectly decided, we do not address this argument because *Waltz* is clearly binding in its interpretation of the relevant statutes.

³ We do not reverse on the basis of the rule set forth in *Pohutski v City of Allen Park*, 465 Mich 675, 695-696; 641 NW2d 219 (2002), as suggested by Judge O'Connell in his concurring opinion, because this is the precise issue to be determined by the conflict panel.

⁴ (Docket No. 261331, issued 2/23/06).

retroactivity question decided in *Ousley, supra*, the doctrine of equitable or judicial tolling applies in situations such as that involved here. Because this issue is dispositive regardless of the decision of the conflict panel, we reverse and remand for further proceedings.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Karen M. Fort Hood

/s/ Helene N. White